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# In the Supreme Court of the United States

OCTOBER TERM, 1968

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY AND THE TEXAS AND PACIFIC MOTOR TRANSPORT COMPANY,

*Plaintiffs-Appellants,*

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and PERMIAN BASIN RAILROAD COMPANY,

*Defendants-Appellees.*

On Appeal From the District Court for the Northern District Of Texas, Dallas Division

## JURISDICTIONAL STATEMENT

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**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE TEXAS AND PACIFIC RAILWAY COMPANY AND THE TEXAS AND PACIFIC MOTOR TRANSPORT COMPANY,**

*Plaintiffs-Appellants,*

VS.

**THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, and PERMIAN BASIN RAILROAD COMPANY,**

*Defendants-Appellees.*

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On Appeal From the District Court for the Northern District Of Texas, Dallas Division

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## JURISDICTIONAL STATEMENT

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Appellants, The Atchison, Topeka and Santa Fe Railway Company, The Texas and Pacific Railway Company, and The Texas and Pacific Motor Transport Company, appeal from the judgment of the United States District Court for the Northern District of Texas, Dallas Division, entered May 17, 1968 as amended on June 26, 1968.

## Opinions Below

The Report and Recommended Order of the Interstate Commerce Commission Hearing Examiner, not reported, is attached as Appendix 1.*

The Report and Decision of the Interstate Commerce Commission, reported as *Permian Basin Railroad Co. Construction Between Odessa and Seagraves, Texas,* 330 I.C.C. 256 (1967), is attached as Appendix 2.

The opinion of the three-judge District Court, not yet reported, is attached as Appendix 3.

## Jurisdiction

This action was brought by appellants in the District Court for the Northern District of Texas, Dallas Division, under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-25 and 49 U.S.C. § 17, to enjoin and set aside an order of the Interstate Commerce Commission entered in Finance Docket No. 22475, in which the Commission rejected the findings and conclusions of the Hearing Examiner and authorized construction of a new railroad line by the Permian Basin Railroad Company between Seagraves and Odessa, Texas.

A three-judge court was convened pursuant to 28 U.S.C. §2325. The judgment of the three-judge court, approving the Commission's order, was entered May 17, 1968, and was amended on June 26, 1968. Appellants filed notice of appeal in the court below on July 15, 1968.

Jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b), and is sustained by *Interstate Commerce Commission* v. *New York, New Haven & Hartford Railroad Co.,* 372 U.S. 744 (1963).

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* Because of its length, the report of the Hearing Examiner, together with the report of the Commission and the opinion of the court below, are printed in a separately bound volume.

## Questions Presented

Permian Basin Railroad Co., a corporation which is not owned by or related to any other carrier or industry, applied for Commission approval to construct an 80-mile branch line railroad in west Texas.

After extensive hearings, the Interstate Commerce Commission's Hearing Examiner made detailed findings regarding Permian Basin's projected income and expenses, and concluded that the proposed railroad would operate at an annual deficit of over $400,000. He recommended that Permian Basin's application be denied.

On review, without enunciating a factual basis for rejecting its Examiner's findings, and without making fact findings of its own, the Commission asserted that Permian Basin would incur an annual loss of $250,000 if the incorporators' proposed method of financing was approved, but that Permian Basin could anticipate a $50,000 annual profit if construction costs of over $9,000,000 were funded solely by equity capital. The Commission stated that ". . . Within reasonable limits, residents of the area involved should be permitted to assume the risks involved in constructing a railroad. . . ." The Commission approved Permian Basin's application.

The three-judge court approved the Commission's order, holding that the Commission was not required to make findings as to Permian Basin's anticipated expenses and income, and that the claimed need for the proposed railroad and the willingness of investors to fund the project required approval of the application "irrespective of profitability."

This decision gives rise to the following questions:

1. Did the court below err in approving the Commission's unprecedented *laissez faire* doctrine, irrespective of the evidence that the proposed line will in all likelihood not be able to operate profitably?

2. Did the Commission fail to make its own determination of whether the proposed railroad should be constructed, and instead abandon that function to Permian Basin's incorporators?

3. Is there any substantial evidence to support the Commission's conclusion that Permian Basin's application should be granted?

4. Is the Commission's report so lacking in factual findings that the protestants have been deprived of their right to obtain meaningful judicial review of the Commission's decision?

## STATEMENT*

Permian Basin, a Texas corporation, applied to the Commission for authority to construct and operate a freight railroad approximately 80 miles long, between the end of the Santa Fe branch line tracks at Seagraves, Texas and the T&P main line tracks at Odessa, Texas. A map of the

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* Abbreviations used in this brief are:

Permian Basin Railroad Company—"Permian Basin."

The Atchison, Topeka & Santa Fe Railway Company and its subsidiaries—"Santa Fe."

The Texas & Pacific Railway Company and its subsidiaries—"T&P."

"Tr. ....." refers to the transcript of hearings before the Hearing Examiner which is included in the record on appeal filed in this Court.

proposed route appear as Appendix A to this statement, page 32; see also Appendix B to this statement, page 33.

The proposed line would traverse Andrews County and parts of Ector and Gaines Counties, Texas. It would provide more convenient service to less than 25% of the residents of these three counties, since existing lines are closer than the proposed line to the great majority of residents. (App. 1, p. 6-7, 64; App. 2, p. 78-79, 98)**

The area is also served by a number of responsible trucking companies and many irregular-route oil field haulers, which operate under Commission authority on the area's well developed highway system (see Appendix C to this statement), as well as by an extensive oil and gas pipeline system. (App. 1, p. 64-65; App. 2, p. 98; Tr. 1920.)

Permian Basin has no control over or ownership in any other carrier or business, nor it is controlled by any carrier, corporation or person, and it is not connected with any industry which might use the proposed line. Its sole function is to construct and operate the proposed short line railroad. In order to raise funds for construction of the line, purchase of equipment and initial costs—estimated at more than $9,000,000—the incorporators of Permian Basin propose to petition the Commission for authority to sell (i) $5,000,000 in common stock and (ii) $5,000,000 in 6% bonds; this petition will be presented to the Commission pursuant to 49 U.S.C. § 20(a) if and when final approval is received by Permian Basin to construct and operate the proposed line. (App. 1, pp. 3, 24, 62.)

Hearing Examiner Edmund T. Fritz received evidence on 35 days (4,610 pages of transcript, 92 exhibits). The

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**Almost 70% of the 116,712 persons in these three counties reside in Odessa and Seagraves and thus already have rail service immediately available.

chief issue was whether Permian Basin would be able to operate the proposed line profitably, or whether (as protestants contended) the line was destined for financial failure.

In February, 1966, the Hearing Examiner issued his report recommending denial of Permian Basin's application. In a detailed, commodity-by-commodity analysis of the evidence, the Examiner found many of the Permian Basin estimates of income to be grossly overstated. He found that the proposed line would incur a deficit of over $400,000 in its first year of operation, including $300,000 debt service expense, and that the deficit would increase in each succeeding year. (App. 1, pp. 62 to 63, 75.)

Permian Basin filed exceptions to the Examiner's report.* In March, 1967 the Commission announced its decision rejecting the Examiner's recommendation and approving Permian Basin's application. (App. 2, pp. 73 to 93.) Three members of the Commission dissented. (App. 2, pp. 94-100.)

*Permian Basin's Estimated Income and Expenses*

Permian Basin projected that its first year revenues would be $1,754,343, and its operating expenses $981,665, for net railway operating income of $772,678. (App. 1, pp. 27, 68.) The protestants estimated Permian Basin's revenue at $256,950, operating expenses at $415,987, for a first year operating deficit of $159,037. This estimate did not include debt service expenses. (App. 1, p. 75.) The Hearing Examiner made detailed findings of fact concerning Permian Basin's estimates of traffic and

* The exceptions were originally assigned to the Finance Review Board and then recalled by the full Commission.

expenses, and he projected a first year operating deficit of over $100,000, plus debt service expense of $300,000, for "an annual overall deficit exceeding $400,000." (App. 1, pp. 62-63.)

The Commission's report deals with Permian Basin's projected income and expense in a vague and peremptory fashion. *Without explaining the source of its figures,* the Commission estimated that Permian Basin's first year revenue would be approximately $600,000 with expenses of about $550,000, for net operating income of $50,000; *this estimate does not include debt service expense, projected by Permian Basin at $300,000 per year.* (App. 2, pp. 88-89.)

Following is a brief discussion of the principal items in controversy concerning Permian Basin's projected income and expenses.

*Sugar beets.* Permian Basin estimated that in 1964 250,000,000 pounds of sugar beets would be grown in Gaines County, and that Permian Basin would carry the beets 196 miles from Seminole to Hereford, Texas, producing revenues of $104,710. (Tr. 998-1048.) This estimate was *three times* the entire sugar beet production in all of Texas in 1963. (App. 1, p. 35.)*

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* "Texas Field Crop Statistics," Bulletin 45, February, 1968 (published by the United States and Texas Departments of Agriculture), page 29.

Other exaggerations permeated Permian Basin's estimates of income. Even the Commission was unable to subscribe to Permian Basin's estimate of annual revenue of $314,447 for hauling 365,000,000 pounds of iron ore (i) from non-existent mines (ii) in an area in which no iron ore survey had been made (iii) over spur tracks which Permian Basin did not intend to construct.

Both the Examiner and the Commission agreed with protestants that Permian Basin could expect *no* iron ore traffic in the first five years of operation. (App. 1, pp. 35 to 37; App. 2, pp. 85 to 86.)

The Examiner found, "No reasonable prospect has been demonstrated that sugar beets will be transported during the 5 year period." He based this finding on three factors, *viz.*, (1) no sugar beets had been grown in the area during or prior to 1962 and in 1963 only a few test plantings had been made; (2) the practice in the sugar industry is to locate refineries so that the beets move no more than 50 miles from field to refinery, and no evidence was introduced that there would be an exception made to this practice in Gaines County; and (3) the refinery to which Permian Basin expected to ship the beets, in Hereford, Texas, has its entire quota of sugar beets allotted by the Secretary of Agriculture to an area north of Permian Basin's proposed line. (App. 1, p. 35.)

In its exceptions to the Examiner's report (p. 137), Permian Basin admitted that its projection of sugar beet traffic "is speculative." The majority of the Commission nevertheless rejected the Examiner's finding, saying "Although only test planting of sugar beets has been started in the area, it is reasonable to conclude that applicant would derive some revenue from sugar beet traffic during the first five years of operation and that its estimate is not unduly optimistic." (App. 2, p. 86.) The Commission accepted Permian Basin's speculation that beets would be grown in Gaines County* and that growers would ship the beets more than 50 miles to the Hereford refinery; no mention is made in the Commission report of the quotas allocated by the Secretary of Agriculture.

*Coarse grain.* Permian Basin estimated that in the first year it would carry 351,889,000 pounds of coarse grain, producing revenues of $381,120.73.

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*Appellants' counsel have verified that the test plantings have been abandoned and that no sugar beets are presently being grown in Gaines County.

The Examiner found that Permian Basin would carry 516,250 pounds, for revenues of $30,519. He observed that Permian Basin's estimates included *(inter alia)* (1) grain which farmers and elevator operators had testified they would not and could not ship by the proposed line; (2) multiple counts of the same grain; (3) grain which could not be shipped by rail without construction of spur lines not included in Permian Basin's construction plans; (4) grain which would be consumed locally by substantial numbers of horses and cattle; and (5) grain grown in areas closer to other railheads than to the proposed line. (App. 1, pp. 40 to 42.)

Without discussing any of the evidence or factors cited by the Examiner, the majority of the Commission said (App. 2, p. 87):

> ". . . We believe that the examiner erred in accepting the protestants' estimates, although we agree that applicant would not secure all the traffic in coarse grain in the two-county area. Although it is not possible to predict the precise amount of coarse grain traffic that would be moved by applicant, it is clear that, considering the vast production of grain in Gaines and Andrews Counties, and the adaptability of this commodity to rail transportation, applicant would secure a much larger share of this traffic than was estimated by the protestants."

The majority made no finding as to what revenues could be anticipated from coarse grain traffic.

*Oil field supplies.* Permian Basin's incorporators asserted that a primary purpose of the proposed line was to offset the effects of declining oil and gas exploration and development activity in the area, which had already caused a decline in its economy. Permian Basin nevertheless esti-

mated that in its first year it would derive $131,237 from transporting 64,870,888 pounds of oil field supplies.

The Examiner found, however, that first year revenues for oil field supplies would be only $2,268. He based his finding upon testimony of the area's principal suppliers and oil company users of oil field supplies that they would not ship over the proposed line because establishing new stockpiles of supplies at either Andrews or Seminole would largely duplicate those already maintained at Odessa and Hobbs, which are within a 100 mile radius of the producing area. They testified that the small savings in trucking costs would be more than offset by added inventory costs. (App. 1, pp. 37 to 38.)

The majority of the Commission said, ". . . We cannot accept the protestants' premise that no change in the distribution system would result from constructing a railroad in this prosperous oil producing area. In our opinion, applicant's estimate is more realistic than that of the protestants." (App. 2, p. 87.) The majority did not discuss the testimony relied upon by the Examiner, nor did it make any finding as to the revenue it believed would be obtained from this traffic.

*Other commodities.* The only discussion in the Commission's report regarding 36 other commodities is the following statement (App. 2, pp. 87-88):

> "Several other commodities, such as new automobiles, anhydrous ammonia, cotton, and petroleum products were either excluded from the examiner's revenue projections for the first year operation, or were credited with only a minimal amount of prospective revenue. We believe that applicant's study performed by local residents with intimate knowledge of the area, supports a much larger revenue projection than that accepted by the examiner."

The Commission gave no explanation of the "much larger revenue projection" or the expected income and expense allocable thereto. In fact, the detailed findings of the Examiner regarding these commodities demonstrate that the Commission's generalities are without foundation. For example:

*Cotton.* Permian Basin estimated 86,350,000 pounds of cotton would travel the new road with revenues of $151,113. After detailing the evidence as to why a changeover from present truck transport was improbable, the Examiner accepted protestants' estimates of tonnage of 22,140,900 pounds and revenues of $68,748 as "more realistic." (App. 1, pp. 45 to 46.) The Commission did not discuss any of the evidence concerning cotton traffic.

*Automobiles and parts.* First year traffic in automobiles and parts was estimated by Permian Basin at 9,930,040 pounds producing revenues of $77,003. The Examiner discussed in detail the evidence which established that the auto industry has converted to rail-truck movements, using tri-level and bi-level cars which are unloaded by special unloading equipment at distribution points; each installation costs over $100,000. The automobiles are then trucked or driven to dealers from those points. Since the automobile industry has not used Odessa and Midland as distribution points, even though those cities are on the T&P main line, he found that it was unrealistic to expect that distribution points would be located at the smaller cities of Andrews or Seminole. (App. 1, p. 39.) The Commission did not discuss any of the evidence concerning automobiles and parts.

*Beer.* Permian Basin estimated that in its first year it would transport 26,650,000 pounds of beer from Golden, Colorado, to Odessa with revenues of $35,475. This is the

amount of beer moved in 1962 from Golden to a distributor located near Odessa. The evidence established, however, that the distributor ships by his own tractor-trailer despite the presence of a nearby rail line because "rail costs were higher than his trucking costs." The Examiner therefore found that no revenue could be anticipated from beer. (App. 1, pp. 39-40.) The Commission did not refer to beer in its report.

*Cement.* Permian Basin projected first year cement traffic of 21,991,252 pounds, producing revenue of $16,821. The Examiner found that a substantial part of this cement presently moves from Maryneal to Brownfield, Texas via the Santa Fe, and would not be transported over the proposed Permian Basin line because this would entail shipping the cement a greater distance than at present, with transfers to three different railroads *en route.* Based upon testimony of shipper witnesses, the Examiner found that another 3,500,000 pounds of cement, presently trucked from Duro to Andrews, Texas, would not be changed to a more expensive, less efficient combination of truck and rail. The Examiner concluded that Permian Basin could reasonably expect to ship 12,711,900 pounds of cement for revenues of $10,257. (App. 1, pp. 43 to 44.) The Commission did not refer to cement in its report.

*Sand.* Permian Basin estimated it would carry 9,153,730 pounds of sand, producing revenue of $5,309. The Examiner found that added loading and unloading expenses required if the shippers sent their sand by rail rather than truck (both routes involving the same number of miles), made prospective revenues of any more than $380 unrealistic. (App. 1, pp. 44 to 45.) The Commission did not refer to sand in its report.

*Expenses.* Regarding Permian Basin's anticipated expenses, the Commission said (App. 2, p. 88):

> ". . . With revenues of $600,000 a year and projecting railway costs in the same general way employed by protestants in their exhibits, applicant would incur costs in the neighborhood of $550,000 . . ."

Contrary to this assertion, the majority of the Commission did not project railway costs as protestants had. Protestants submitted detailed exhibits and almost 900 pages of testimony in explaining each item of Permian Basin's anticipated costs. The majority made no such breakdown, nor any summary or finding, nor did it otherwise explain its basis for rejecting the Examiner's findings as to estimated costs.

*The rationale of the Commission majority.*

Without explanation of the basis for its figures either as to income or expense, a majority of the Commission said (App. 2, p. 88):

> ". . . The most reasonable estimate warranted by the evidence of record is that revenue for the first year would be in the neighborhood of $600,000. This estimate is based on movements of sugar beets, grain, new cars, petroleum products, fertilizer, lumber and other commodities in volumes considerably greater than those estimated by protestants and considerably less than estimated by applicant. With revenues of $600,000 a year and projecting railway costs in the same general way employed by protestants in their exhibits, applicant would incur costs in the neighborhood of $550,000 and derive net income of about $50,000. *Such net income would fall far short of the $300,000 debt service expense contemplated by applicant.*" (Emphasis added.)

Thus, the majority recognized that if bonds were sold as Permian Basin's incorporators proposed, Permian Basin's

expenses would be more than one-third greater than its income. The majority said, however, that the debt service expense of $300,000 might not be incurred because when Permian Basin petitions the Commission for authority to issue securities, the Commission might deny permission and instead order the construction and operation funds to be raised by sale of stock or contingent income bonds. (App. 2, p. 93.)

The majority said (App. 2, p. 89):

> "This is an unusual case. In an age of declining rail mileage, this proceeding stands out as a proceeding to construct a new railroad. The applicant and the residents of the area have shown great faith in the future growth of the three counties involved. Within reasonable limits, residents of the area involved should be permitted to assume the risks involved in constructing a railroad. If those most directly concerned are willing to risk their capital with full knowledge of all relevant circumstances, the Commission should be most reluctant, for reasons of paternalism, to deny them an opportunity to improve the economy of their area. This is particularly true where the area involved has been largely dependent on the prosperity of a single industry but may with the aid of adequate rail service develop a more diversified economic base. There is a substantial reservoir of traffic available in the area and applicant should not be denied an opportunity to tap it unless the Commission is reasonably certain that its knowledge of local economic conditions exceeds that of those in the area who are prepared to invest in its future."

The Commission relied on *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I.C.C. 237 (1924), as "the controlling precedent for the disposition of this proceeding." (App. 2, pp. 90 to 92.)

*The rationale of the dissenting Commission members.*

The three dissenting members of the Commisison argued that the majority's decision was "based not on law or fact, but on faith, hope and charity and in disregard of the statutory mandate." (App. 2, p. 94.) They said (App. 2, p. 98):

> "A realistic analysis of the applicant's evidence makes it manifest that about 50% of the anticipated traffic would not materialize."

The dissenters were of the opinion that the proposed line had little chance of success and that its failure would fall as a burden upon the "transport system generally." (App. 2, p. 100.)

With respect to the majority's concern about local interest in the proposed line, the dissenters said (App. 2, pp. 98 to 99):

> "Nor is the evidence convincing that the local people have 'a full knowledge of all relevant circumstances' as is implied in the majority report, or that they are willing to risk their capital on the basis of the promotional activity. The record shows that 13 individuals who are promoting the enterprise have paid in $5,000 or about 1/20 of one percent of the estimated amount needed to construct the railroad. An additional $40,000 was paid in by others in return for an assignment of stock subscription rights; the total amount paid in being less than ½ of one percent of the construction costs.
>
> "This indicates a marked hesitancy on the part of all concerned. And in view of that, this Commission should be most reluctant to signify approval on the basis of this tenuous record, particularly since that approval and the finding that the railroad is needed to satisfy the requirements of the public convenience and necessity, can, in turn, be used to help market the applicant's securities. Regardless of how the enter-

> prise is financed, whether by borrowed funds or the sale of stock, the ordinary legal safeguards upon which the public relies in dealing with securities in general will not apply. For the issuance of carrier securities is under the surveillance of this Commission. It ill behooves this Commission, therefore, to issue a report which, in effect, gives every indication that the proposed rail operation will be a glowing success. It should be made perfectly clear, as was done in the *Wenatchee Southern* case, *supra*, that the enterprise shows little promise of success."

The dissenting members of the Commission stated further that "the majority report's analogy to the *Wenatchee Southern* case is entirely inapt," since "that case was decided in 1924 prior to the development of a significant motor carrier industry" and further because "it involved a one-product (apples) area totally dependent upon rail service." They pointed out the great hesitancy upon the part of the Commission to authorize the building of the Wenatchee Southern (the vote was 5 to 5 with one reluctant concurrence in favor of the grant), and that after two extensions the certificate was allowed to expire and the Wenatchee Southern line was never built. The dissenters stated (App. 2, pp. 99 to 100):

> "If anything, the history of the Wenatchee Southern should stand as a lesson in the hard facts of economic life and be a warning that, where little need, if any, exists for more transport facilities, additional facilities are likely to falter, and their burden will fall upon the transport system generally."

The Commission denied protestants' petition for reconsideration. Protestants then filed suit in the United States District Court of Texas, Dallas Division, for review of the Commission's decision. A three-judge court was convened pursuant to 28 U.S.C. §§2284 and 2325.

*The ruling of the three-judge court.*

On May 17, 1968, the court approved the order of the Commission. In a brief opinion, the court said that the "presence of a great need in the Permian Basin for the proposed railroad balanced against only a minimal threat of hardship to other carriers provides an adequate basis for the Commission's order, *irrespective of profitability.*" (Emphasis added.) The court did not discuss any of the evidence introduced before the Examiner. As had the Commission, the court cited the *Wenatchee Southern* case to support its decision.

Appellants filed their notice of appeal to this Court on July 15, 1968.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

### I.

### THE COMMISSION'S ORDER AND REASONING EMBODY AN UNPRECEDENTED LAISSEZ FAIRE DOCTRINE WHICH IS IN CONFLICT WITH THE POLICY UNDERLYING THE TRANSPORTATION ACT OF 1920.

The authorization of the proposed Permian Basin railroad runs counter to the very policy which in 1920 caused Congress to require Commission authority before new railroads are constructed.

The simple truth, clearly demonstrated by this record, is that the area to be served cannot and will not support the proposed line. Even on the Commission's euphoric view of the evidence, a $250,000 annual deficit will be incurred if Permian Basin is financed as its incorporators propose. The court below upheld the Commission's order only by ignoring the applicable principles and adopting a new test which operates "irrespective of profitability."

The Commission and the court below, without any meaningful discussion of the evidence, repudiated the findings of the experienced Hearing Examiner that construction of the new line will not serve the public convenience, and adopted instead a *laissez faire* philosophy regarding new railroads, stating (App. 2, p. 89):

> . . . "If those most directly concerned are willing to risk their capital with full knowledge of all relevant circumstances, the Commission should be most reluctant, for reasons of paternalism, to deny them an opportunity to improve the economy of their area. . . . There is a substantial reservoir of traffic available in the area and applicant should not be denied an opportunity to tap it unless the Commission is reasonably certain its knowledge of local economic conditions exceed that of those in the area who are prepared to invest in its future."

The court below approved and applied this new test (App. 3, p. 105):

> ". . . The presence of a great need in the Permian Basin for the proposed railroad balanced against only a minimal threat of hardship to other carriers provides an adequate basis for the Commission's order, *irrespective of profitability.*" (Emphasis added.)

Quite apart from the lack of evidence to support the finding of "a great need in the Permian Basin for the proposed railroad," this novel standard represents a radical departure from past policy and decisions, and indicates that the Commission has adopted the very approach toward new railroads which Congress sought to abolish in the Transportation Act of 1920 (49 U.S.C. §§ 1 *et seq.*). This ruling is unprecedented and erroneous. The Court should intercede now to prevent further applications of this misguided concept.

*Legislative history.*

The recognition that unprofitable railroads present a burden to other railroads, the transportation system generally and the public, was one of the principal factors which led Congress to enact the Transportation Act of 1920. In that Act, the Commission was empowered to regulate all new construction, extensions, acquisitions and abandonments of railroads. The legislative history of Section 1(18)—which requires Commission approval *before* any new railroad line may be constructed—discloses that it was intended to avoid the problems inevitably created by "weak roads" by preventing construction of lines, such as the proposed Permian Basin line, which hold little promise of financial success.

Just prior to the passage of that Section, Representative Esch, Chairman of the House Committee on Interstate and Foreign Commerce, made the following statements to the full Committee (58 Cong. Rec. 8316 (Nov. 11, 1919)):

> "We believe one main cause of the so-called 'weak sister' has been the unrestricted right of railroads to build wherever their projectors thought fit.
>
> * * *
>
> "How does this bill stop that? In this way: Before a road or an extension thereof can be built, it must get what is called in this bill a certificate of convenience or necessity from the Commission as a condition precedent to the building of a single rod of the extension or of the new line.
>
> * * *
>
> "This is not new law. Several of the states have this same kind of law now, notably the State of New York and the State of Wisconsin and other states, and the law has worked successfully. It has prevented the construction of new lines that could not by any possibility have any hope of meeting operating expenses,

not to say anything about profits. *It would prevent the construction of some of these shortlines which may have no hope of ultimate financial success.*" (Emphasis added.)

The national transportation policy of Congress is expressly stated in a preamble to the Transportation Act (49 U.S.C. §§ 1 *et seq.*): ". . . to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers . . ."

Senator Cummins, speaking to the Senate, pointed out how the desire to profit on the sale of securities and on construction of new railroads had led to the building of economically unfeasible lines (59 Cong. Rec. 748 (Dec. 17, 1919)):

> "If there is any one thing from which the transportation system of the country, taken as a whole, is now suffering, it is from the unguided, uncontrolled right of owners to build railroads whenever they may see fit to build them and whenever they can avail themselves of an opportunity to sell at a profit the securities based upon the supposed construction.
>
> * * *
>
> ". . . A great many have been built that never should have been constructed. We are now under the disadvantage of having developed a system which must be maintained because communities have been built along the railways, and their interests cannot be disregarded in regulations which we shall adopt. The whole trouble to which I referred in my opening statement has arisen because of the building of railways simply to make money out of their construction and without regard to the possible profit of their operation."

These were not idle speculations, nor are they out of date. One of the officers of Permian Basin is in the used railway equipment business, and another is a real estate developer who owns 9,500 acres of land near the proposed line. (Tr. 1711, 1851-84.) The incorporators intend to sell millions of dollars worth of stock to the public.

This Court is well aware of this legislative history and policy. Mr. Justice Brandeis spoke of it in *Texas & Pacific Ry. Co.* v. *Gulf, Colo. & Santa Fe Ry. Co.*, 270 U.S. 266, 277 (1926):

> "By that measure [the Transportation Act of 1920], Congress undertook to develop and maintain for the people of the United States, an adequate railway system. It recognized . . . that the building of unnecessary lines involves a waste of resources and that the burden of the waste may fall on the public."

*Prior Commission decisions.*

It is revealing that the only case cited by the Commission and the court below to support approval of Permian Basin's application is the 1924 *Wenatchee Southern* case, in which a group of apple growers who desired the services of the proposed line had agreed to subsidize the railroad's losses. The Commission's certificate of authority lapsed unused four years after it was granted.

Never before in its history has the Commission approved an application to construct a new railroad which is unrelated to another carrier or to an industry, where the Commission's own estimates of income and expense show that the railroad will probably operate at a loss from the very outset.

Until now, the Commission has recognized that, as a fact of economic life, an unsubsidized business must either operate at a profit or go into bankruptcy.

Pursuant to its new *laissez faire* attitude, the Commission asserted that the risk of loss would fall on the investors, not the public. But the Commission itself supplied the answer to that misguided theory in *Application of Michigan Northern R.R. Co.*, 65 I.C.C. 480, 485 (1920). In denying a certificate, the Commission said:

> ". . . The present record, however, raises serious doubts regarding the probable success of the project. If the new line should be constructed, many people would doubtless build homes, schools, churches, and commercial and industrial establishments which, once constructed, would become and remain primarily dependent upon the projected railroad. In the event of failure of the new line these people would generally suffer more heavily than those who invest their money directly in the enterprise."

Similarly here, those who may construct places of business in reliance upon the new line will suffer with the investors in the railroad.

For some reason, the Commission overlooked the public interest in avoidance of unnecessary facilities. The lack of probable profit is indicative of lack of need for the service. This was recognized by the Commission in *Kansas & Oklahoma R. Co. Acquisition and Proposed Construction*, 180 I.C.C. 239, 246 (1931) in which authority to construct a new line of railroad was denied:

> ". . . The agricultural area is already highly developed, is adequately supplied with outlets, and apparently receives satisfactory transportation service. There is no reasonable assurance that the extended line would enjoy enough traffic to operate profitably. . . . In brief, this independent short line would place a burden on the transportation system, which, as we have frequently pointed out, is most undesirable from the standpoint of the public interest."

See also, *Application of the Golden Belt Railroad of Kansas,* 67 I.C.C. 370, 372-3 (1921) ("... The fundamental objection to the proposal is that the traffic which may reasonably be expected is inadequate to support the project ..."); *Monon Railroad Construction and Operation,* 324 I.C.C. 208 (1965); *Ozark & P.V. Ry. Co. Construction,* 166 I.C.C. 441, 447 (1930); *Construction of Line by M. & S.V. Railroad,* 99 I.C.C. 606, 608 (1925).

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Today, the Commission is overtaxed with applications for abandonment of short line railroads. A list of 146 branch and short line abandonments between 1942 and 1967 is printed as Appendix 4, pages 107 to 115 of the separately bound appendix volume.

Owing to drastically altered modes of transportation, the nation's largest railroads have found it necessary to merge with one another in order to eliminate wasteful duplication of facilities and to avoid fatal losses. See, for example, *Penn-Central Merger and N. & W. Inclusion Cases,* 389 U.S. 486 (1968).

In light of this trend, it makes no sense to authorize construction of a new railroad under conditions which all members of the Commission admit make success very doubtful and financial disaster a likelihood.

The Commission's function is to bring to bear its expertise and to determine on which side of a particular controversy the public interest lies. *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241 (1945). Even if speculators can be found to assume the risks involved, the local communities and business people who make substantial expenditures in reliance on the railroad will not be protected against the burden which will ultimately be imposed by the road's failure. Bankruptcies and

reorganizations are necessarily harmful to the economy. Any slight benefit to local shippers in securing competitive services does not adequately offset the burdens and risks to the general community as a result of an unnecessary duplication of existing truck and rail facilities.

In the light of the dangers which the decision appealed from holds for the transportation industry and the public, this Court should summarily reverse the order of the court below.

## II.

## THE COMMISSION ABDICATED TO THE INCORPORATORS OF PERMIAN BASIN ITS STATUTORY DUTY TO DETERMINE WHETHER THE PROPOSED LINE SHOULD BE CONSTRUCTED.

Instead of discussing and weighing the evidence, as the Examiner did, the Commission abandoned this function to the applicant, stating, "Applicant should not be denied an opportunity . . . unless the Commission is reasonably certain that its knowledge of local ecenomic conditions exceeds that of those in the area who are prepared to invest in its future." (App. 2, p. 89.) But the Commission, not the applicant, should determine whether a proposed new railroad will probably be successful before authorizing construction, and it should do so on the basis of the record, not the enthusiasm and optimism of the applicant.

The dissenting members of the Commission called attention to this defect in the majority's report (App. 2, pp. 94, 96):

> "Whatever may be the merits of these propositions, a decision based thereon is a decision based, not on the law or facts, but on faith, hope and charity, and in

disregard of the statutory mandate. In a purely private matter not affecting the public interest in a substantial or essential way, I would unhesitatingly support the proposition that people should be free to invest, risk, or spend their own money in any legitimate way they choose. But this is not such a matter. We are here concerned with a project imbued with the public interest, and one for which Congress has laid down definite standards. Section 1(18)-(20) of the Act (under which the application was filed), and the national transportation policy, establish the legal requirements and our guide for decision. They impose upon the applicant an obligation to show that the proposed line is required by the public convenience and necessity; and upon the Commission, a duty to decide the case on the basis of that showing, and not on presumption.

* * *

"It is plain, therefore, that when this Commission, in appraising the record, insists upon an applicant sustaining the evidentiary burden imposed by law, it is performing its assigned duty with regard to the Nation's transport system, and is not exercising a gratuitous paternalism toward the entrepreneurs. Further, in performing this duty, the Commission is not free to confess lack of adequate knowledge, and, on that ground, defer to the judgment of the applicant and its promoters. If the applicant's evidence does not convince, then the application must be denied.

The Commission is obligated under the statute to make its own careful analysis of the evidence and to draw its own conclusions. It may not, as in the case at bar, shunt this responsibility to the applicant. The court below erred in approving the Commission's erroneous report.

## III.

## THE COMMISSION'S DECISION IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE.

Under Section 10(e) of the Administrative Procedure Act (5 U.S.C. § 706), this Court is empowered to set aside "agency action, findings and conclusions found to be . . . (E) unsupported by the substantial evidence in a case . . . "

We have set out above the highlights of the evidence relating to the expected income of the proposed line. A more detailed analysis of the evidence appears in the report of the Hearing Examiner (App. 1, pp. 26 to 50).

The Examiner's detailed and carefully reasoned report is a commendable exercise of expertise. His findings and conclusions are fully documented and are supported by the overwhelming weight of the evidence. Having heard the many witnesses, both interested and disinterested, having studied the evidence, and having received extensive briefs, he reached the conclusion that the proposed line will in all likelihood be unable to meet operating expenses, let alone operate at a profit.

The cogent reasons given by the Examiner for his recommended denial of a certificate were not answered in the majority's report. The majority conceded the likelihood that Permian Basin would be a financial failure, but then applied its erroneous *laissez faire* doctrine.

The decision of the court below should be reversed on the ground that the Commission's decision authorizing construction of the proposed line is not supported by any substantial evidence.

## IV.

## THE COMMISSION FAILED TO MAKE FINDINGS OF FACT AS REQUIRED BY LAW.

In the event the Court does not reverse the order appealed from for the reasons set forth in Parts I, II and III above, we ask the Court to remand the case to the Commission with directions that the Commission make findings of fact as required by law.

Section 8(b) of the Administrative Procedure Act [5 U.S.C. § 557(b)] requires in part that "all decisions . . . are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." This section is applicable to the Commission whenever it rules on a petition for a certificate of public convenience or necessity. See *Riss & Co., Inc.* v. *United States,* 341 U.S. 907 (1951), reversing 96 F. Supp. 452 (W.D. Mo. 1950).

A careful search of the Commission's report fails to disclose any findings of fact as to the issues in the case. The Commission made no real findings on the key issues of Permian Basin's expected income, or the basis for its projection of expenses. The Commission denigrated the Examiner's findings, without making any of its own.

The Commission's majority report flies in the face of what this Court said in reversing a Commisison order in *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 295 U.S. 193, 201-202 (1935):

> "This court will not search the record to ascertain whether . . . general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain

to constitute a valid basis for the order. *In the absence of a finding of essential basic facts the order cannot be sustained.*" (Emphasis added.)

In *United States* v. *Chicago, M. St. Paul & P. R. Co.*, 294 U.S. 499, 510-11 (1935) this Court also stated:

> "The difficulty is that [the Commission] has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency [citing cases]. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

See also *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167 (1962).

The Commission has violated its duty to make clear the basis for its decision in its report in this case. The phrases and sentences in the report may allow this Court to speculate as to what the Commission's reasoning was, but that is not enough. *United States* v. *Chicago, M., St. P. R. Co.*, 294 U.S. 499 (1935). Especially since the majority report does not have the underlying support of the Examiner's findings, this case should be remanded to the Commission for proper findings.

In responding to appellant's argument that the Commission's findings were insufficient, the court below said (App. 3, p. 105):

> ". . . Although the Commission did not compute a precise estimate of projected revenues and costs for each commodity, it did make an estimate of *total* revenues and costs, and, further, it named the commodities upon which it focused in revising the examiner's estimate. We believe this to be a sufficient finding of

profitability. To require greater specificity of the Commission in predicting the unpredictable is in our view unnecessary." (Emphasis the court's.)

The view thus expressed by the court below is directly contrary to the holdings of this Court and of many other federal courts, some of which are cited in the footnote below.* Particularly pertinent is the very recent case of *Soo Line Railroad Company* v. *United States*, 280 F.Supp. 907 (D. Minn. 1968), in which a three-judge court remanded the case to the Commission for additional findings, saying (280 F.Supp. at 918-919):

> "Its [the Commission's] finding that the traffic diversion from the Soo would be 'somewhere between the estimate of the applicants and of the Soo,' in our view amounts to no finding at all. . . ."
>
> * * *
>
> "We fully understand that the task of the Commission in determining potential diversion is a difficult and complex one, and that future events may prove that the Commission's findings were wide of the mark. But the very fact that these are difficult and complex matters makes it all the more necessary for the Commission to use its expertise, but use it, it must."

This is precisely what occurred in the case at bar. The Commission stated that its estimate of $600,000 annual revenue is based on movements of various commodities "in volumes considerably greater than those estimated by protestants and considerably less than estimated by applicant." (App. 2, pp. 88-89.) As stated in the *Soo Line* case, these so-called findings amount to no findings at all.

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* *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626 (1945); *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F.2d 554 (D.C. Cir. 1938), cert. den., *sub nom, Gross* v. *Saginaw Broadcasting Co.*, 305 U.S. 613 (1938); *Bell Lines, Inc.* v. *United States*, 263 F. Supp. 40 (S.D. W. Va. 1967).

The Commission itself has subsequently recognized that "findings" such as these are inadequate and lack the required specificity. Upon remand of the *Soo Line* case, the Commission issued a new report in which it stated (333 I.C.C. 236, 238, May 23, 1968):

> "In view of the reading evoked from the court by our prior report, it must be acknowledged that the necessary degree of specificity was lacking; and it is our purpose to correct that inadequacy."

Following these statements, the Commission discusses the estimates of the parties and then makes detailed findings on a car-by-car analysis of the various categories of cars potentially divertible from the Soo Line. Based upon these detailed findings, the Commission concludes that total diversion would be in a specific dollar amount.

Thus, by the Commission's own admission and performance in the *Soo Line* case, predictions of future events in the area of the Commission's expertise can be made with the required specificity and detail.

There are sound policy reasons for the requirement that the Commission detail its basic factual findings. Unless the Commission is required to do so, there is no assurance to the public, the courts or to Congress that it is performing its function of evaluating the evidence and deciding the issues according to its legislative mandate. Thus, in *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943), this Court said:

> ". . . the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

See also *Capital Transit Co.* v. *Public Utilities Comm.*, 213 F. 2d 176 (D.C. Cir. 1953), cert. denied 348 U.S. 816 (1954).

The Commission's vague and indefinite report, if upheld, will deprive appellants of the judicial review to which they are entitled under Section 10(d) of the Administrative Procedure Act (5 U.S.C. § 706). The majority Commission report gives the reviewing court the alternatives of (1) searching the entire record *de novo* to determine whether the Commission was correct, which this Court has said it will not do (see *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 295 U.S. 193 (1935)), or (2) becoming a rubber stamp for Commission action, which courts cannot do (see *Chesapeake Motor Line* v. *United States,* 153 F.Supp. 812 (D.C. Md. 1957)).

The Commisison's failure to make adequate findings requires that the case be remanded to the Commission for further proceedings.

## Conclusion

For the reasons stated herein, appellants respectfully pray that this Court reverse the order appealed from, either summarily or after plenary consideration.

Respectfully submitted,

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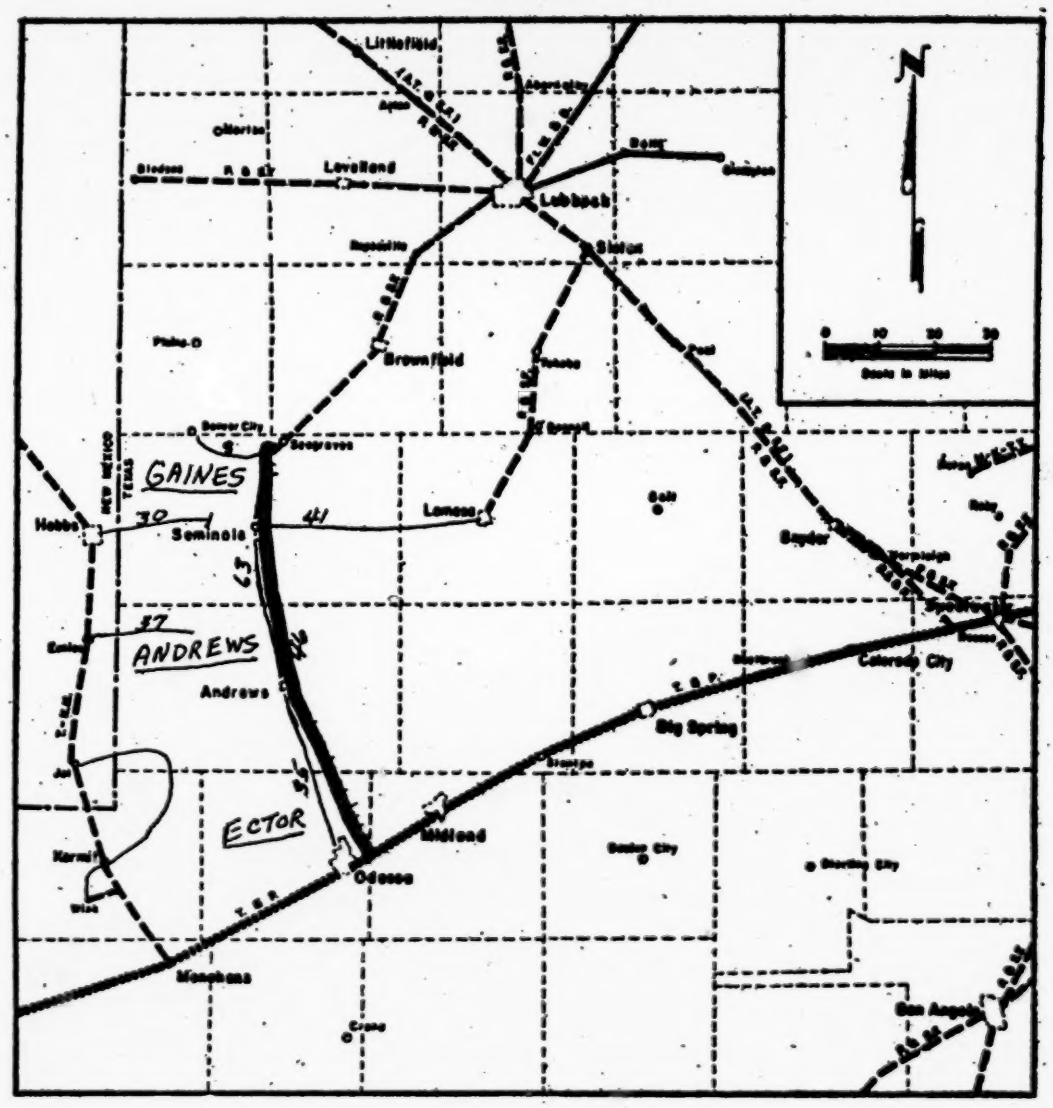
September 13, 1968

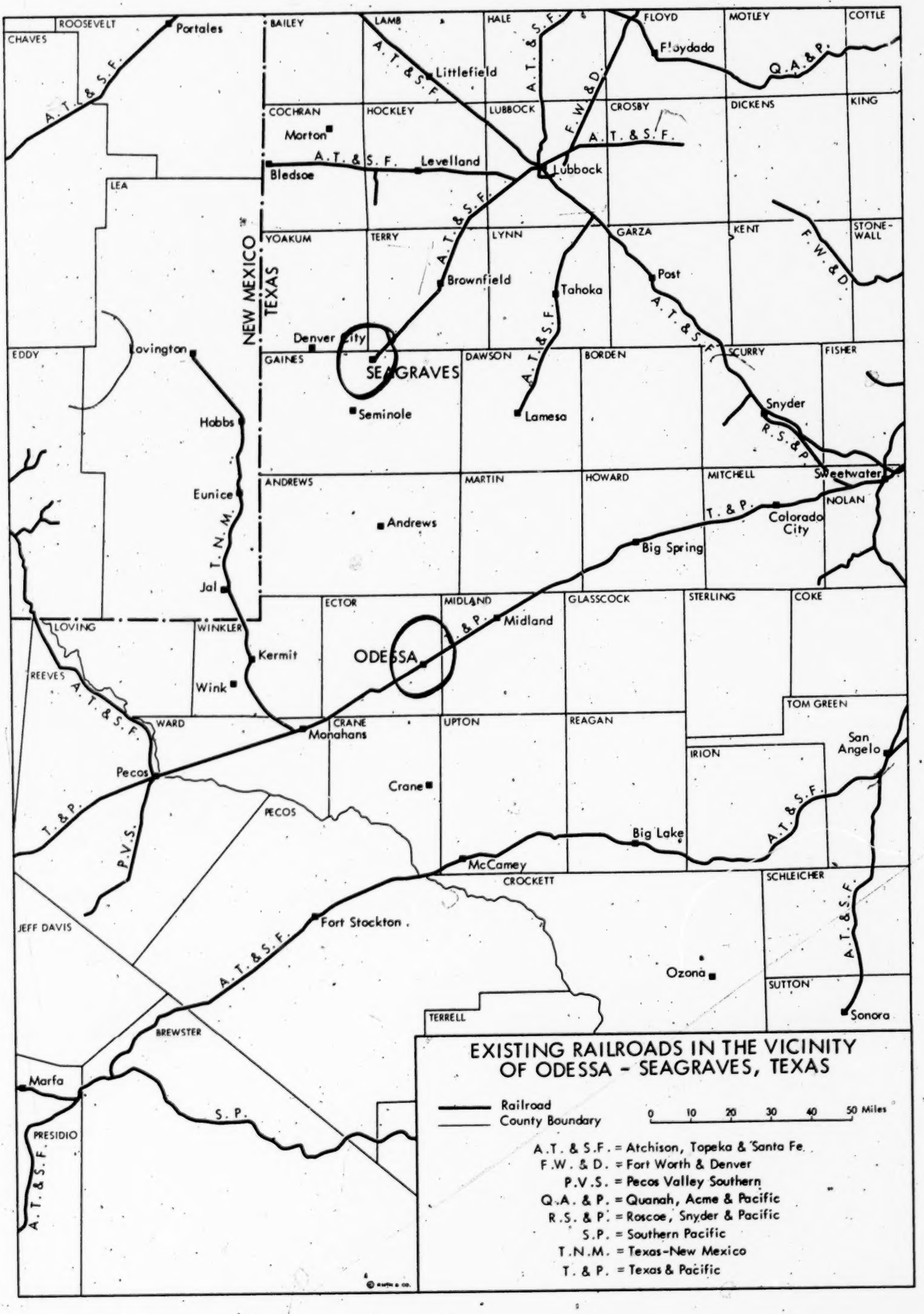
# APPENDIX A

## RAILROAD MAP OF THE PERMIAN BASIN AREA

F.D.No. 22473

AUGUST, 1963






Prepared by Rand McNally & Company, 1968

## APPENDIX C

Prepared by Rand McNally & Company, 1968